No. 10300

In the United States Circuit Court of Appeals

for the Ninth Circuit

PHILLIP SUETTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

Upon Appeal from the United States District Court for the District of Oregon.

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STATEMENT OF THE CASE[1]

Appellant, Phillip Suetter, was indicted (Counts 1 and 2) for using the United States mails in furtherance of a scheme to defraud (18 U.S.C., §338), and (Counts 3-7) by use of the mails and interstate commerce em-

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(1) The statement of facts set forth in Appellant's Brief is inadequate and, in some respects, incorrect. It contains only selected portions of the evidence. Consequently, this counter-statement of the case is necessary. We refer to the Government's exhibits as GX.

ploying said scheme in the sale of securities in violation of Section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. §77q(a)(1)).[2]

The jury found appellant guilty on Counts 3, 4, 6 and 7. He was acquitted on Counts 1, 2, and 5. Following motion for a new trial the court below dismissed Counts 3 and 4. The opinion of the trial judge appears at pp. 229-253 of the Record.[3]

Appellant was sentenced on Counts 6 and 7 to a concurrent penitentary sentence of 2½ years (R. 45-47, 253).

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(2) In Appellant's Brief and Notice of Appeal the section of the Securities Act charged in the Indictment is incorrectly cited as Section 77q(a)(2) Title 15, U.S.C.A. (R. 48, App. Br. 2)

(3) Although the dismissal of Counts 3 and 4 is not in issue on this appeal, we wish to make our position clear that we do not agree with the trial judge's conclusion that simply because Archbishop Beckman had been compelled by the appellant's fraudulent practices to take a more active part in the venture, the securities selling scheme had ended as to him prior to the mailings alleged in those counts. It is our view that there was ample evidence to support the jury's verdict that appellant continued his efforts to induce further investments by the Archbishop as well as the other persons to be defrauded (e.g. R. 223-224). Such attempts to sell investments constitute a sale of securities, as specifically defined by sections 2(1) and 2(3) of the Securities Act of 1933 (15 U.S.C. §77(b)).

STATUTES INVOLVED

The mail fraud statute, in pertinent part, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 17(a)(1) of the Securities Act of 1933, provides:

> (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud, * * *

Section 2(3) of that Act, in pertinent part, provides:

> When used in this title, unless the context other-

wise requires—* * * (3) The term "sale", "sell", "offer to sell", or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; * * *

THE INDICTMENT

The scheme to defraud is alleged, as is customary, in the first count of the indictment, and incorporated by reference in each of the six other counts. In substance, it alleges that from 1934 to 1941 appellant devised and employed a scheme to defraud a class of persons (including six named individuals) whom by false representations appellant would and did persuade to invest in certain gold mining claims located in Josephine County, Oregon, known as the Suetter Placer Mines.

Appellant would and did sell units under a trust agreement, which stated that appellant would hold and operate the claims as sole trustee for the benefit of purchasers, who would be paid their pro rata share; and that appellant would keep a true and accurate set of books, showing the income and disbursement of the trust. These statements in the trust agreement would be and were false, and together with numerous other misrepresentations would be and were employed to induce the persons to be defrauded to purchase the units, to lull them into a false

sense of security concerning their investments, to enable appellant to convert a large part of the investors' money and other property, and to cause the investors to retain their interests. These included false representations that appellant was the sole owner of the mines and had a clear and absolute title thereto; that certain persons had agreed to invest $80,000 in the mines; that all money invested would be used to purchase mining machinery and to defray operating expenses; that the units were a safe, sound and conservative investment; that investors would never lose their investments; that engineers had tested the properties and submitted a favorable report; that the properties were proven; that production would be commenced by September or November, 1937; that he would commence shipping gold to the mint within ninety days after December 16, 1938; that investors would realize large returns of from one to three million dollars during the three years commencing September 30, 1938; that investments in the mines would pay dividends of 20% of $100,000,000; that he had a greal deal of practical experience in mining and had been financially successful; and that he had invested over $50,000 of his own funds in the mines.

The two mail fraud counts (1 and 2) contain mailings in November, 1939, and December, 1940, to Bishop Rhode, one of the persons to be defrauded. Counts 3 and 4 charge securities fraud by use of mailings on May 28

and May 29, 1939, respectively, addressed to Archbishop Beckman, another of the persons to be defrauded. In Count 5 the jurisdictional factor is an interstate telegram in September, 1940 to Father Bubacz, also one of the persons to be defrauded.

Counts 6 and 7, upon which the judgment rests, charge securities fraud and allege mailings from and to Bishop Rhode in July and August, 1939, respectively.

THE FACTS

In June, 1934, the appellant, Phillip Suetter, a bankrupt horsetrader, acquired for $5400.00 in cash, certain placer mining claims in Josephine County, Oregon (Record 60, 91, 203). Funds for the acquisition of this property were obtained from Ralph Montag of Portland, Oregon, who was induced by Suetter to advance over $31,000 to finance the purchase of and to develop and operate said claims (R. 57, 75-79). Appellant gave Montag a half interest in the claims and in any production therefrom (R. 57-58, 83) and a $10,000 note, secured by a mortgage on the claims (R. 62). The note was never paid and the mortgage was never satisfied (R. 62). In spite of these facts, appellant represented to investors that he owned

the claims free and clear, no mention being made of Montag's interests (R. 6, 127-128, 165-168, 178).[4]

The fraudulent character of appellant's assurances of the imminence of profitable production appears clearly from his constant stringing along of investors, and the repetition of such statements over a period of years without any justification or basis in fact. As early as June, 1934, shortly after purchasing the claims, Suetter wrote: "We have spent $7,610 for equipment * * * Everything is now on the property * * * We should be in production now * * *" (GX-3). A few months later, while asking for more money, Suetter wrote Montag, "My intention is to get every dollar of our money out 60 days from start.

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(4) The details regarding the purchase of these claims and Montag's interests are as follows: In February, 1934, Suetter obtained an option to purchase these mining claims for $8,000. Before the option was exercised Montag advanced funds to Suetter, for which he received his half interest (R. 57-58, 83; GX1, GX2). On June 23, 1934, Montag borrowed $7500, which was turned over to Suetter, who then paid $5400, the reduced cash price of the mining claims covered by the option (R. 60-61, 91, and GX3). On June 29, 1934, Suetter executed the note and mortgage mentioned (R. 62, GX-6). Montag's total investment was $31,699.24, which included advances made and bills paid directly from February, 1934, until November, 1936 (R. 75-77, GX-16).

We start last of next week" (R. 65-66).[5] Successful operation did not materialize (R. 78). When, in the spring of 1935, Montag refused to meet part of a payroll, appellant was moved to write him: "Not having any clean up does not condemn the property or me either." (R. 77, 78; GX-17). Montag testified that he "expected a clean up" in the 1934-1935 season but that insofar as he knew there never had been "a clean up" on the properties (R. 61).

In the spring of 1935, Robert H. Strong, a real estate man in Portland, Oregon, made a trip to the mining claims on behalf of some clients in the East, and wrote a factual report for them after first having obtained an option on the claims from Suetter. Strong testified that he was not, and did not purport to be, a mining engineer, and that his survey did not purport to be a mining engineer's report; that his report was intended to be used by, and examined by, persons conversant with mines and mining, and was not intended to be used as a basis for the sale of mines or stock to the public. He further testified that the option he obtained was never exercised (R. 194-195). Apparently this report was the basis for Suetter's representations to an investor that experts in mining

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(5) Similar misrepresentations appear throughout the course of the scheme, as will be noted, *infra.* See for example a statement in August, 1939: "This will result in quick returns" (R. 37, 131).

had been consulted and that they had agreed that there were values in this property not yet touched (R. 128). Suetter admitted in 1941, in a deposition, that he never did employ engineers to examine and test the property (R. 120).

In the latter part of 1935 when Montag refused to advance additional funds for the development of the property (R. 69, 87; GX-12), Suetter sent one Ed Hogan to the Middle West to raise additional funds on a commission basis (GX-7; R. 64, 65). For his services Hogan was also to receive a five per cent interest in the property (R. 207). Suetter testified that he supplied Hogan with an automobile and expense money for the trip East (R. 207).

Hogan obtained money from Stephen A. Bubacz, a Catholic priest of Chicago, Illinois, and $2,000 from Francis J. Beckman, Catholic Archbishop of Dubuque, Iowa (R. 121, 166). In July, 1936, appellant went to Chicago to confer with Hogan (R. 64-65) and to see some Catholic clergymen "he (appellant) had interested * * * in buying an interest in the property" (R. 83). Appellant told Hogan "how it's got to be done" (R. 214). Upon arriving in Chicago, appellant wrote Montag for expense money to assist in putting over a "deal" with the "fathers." Appellant described the deal variously. He said in August and September, 1936:

"* * * E. H. has proven to me that $10,000.00

would not make the set that they would expect to see. Their first money will be $25,000.00 or better. As soon as this first money is turned over to us I am leaving for the mine and E. H. will stay gathering more money until I get the outfit ready for him to leave. I will wire. By that time be plenty of water. They can't stay only four five days. I've got to have things ready and in shape when they arrive at the mine." (R. 65; GX-8)

"The total amount is $329,000 for 49% of the property's output". (R. 212)

"* * * three Bishops and one or two of the other want to take up the whole proposition, and it looks very much they may turn all of said moneys, or at least $100,000 * * *" (R. 214)

To create an appearance of an elaborately equipped project appellant entered into negotiations with William E. Phillips, sales manager of Link-Belt Company, looking toward the purchase of a $250,000 dredge (R. 92). This money was to be derived from the sale of the units (R. 93).

Appellant represented to Phillips that he was "properly financed", and gave the company a cash deposit of $5,000 on the purchase of a $27,000 dragline (R. 108) to be used preliminarily to the dredge (R. 113). Appellant submitted gravel to Phillips for testing the extent and value of the recovery (R. 108). It was also represented by appellant that, apart from the machinery to be pur-

chased, the mines were fully equipped. This statement was untrue, as Phillips later learned (R. 116-117). Appellant did not want Phillips or anyone else to see the property until he, Suetter, could "go to Camp fix things up in good shape then wire Gilmore or Hogan to bring them * * *" (R. 215; GX-114), for one of the purposes in making the misstatements was to sell Phillips and Link-Belt Company employees interests in the mining claims (R. 217, 218).

Units were to be sold for $1,000 each under trust agreements wherein appellant would agree to hold title to the mines for the benefit of those investing in the units (R. 72-74, 210). Phillips gave his $1,000 note for one unit and later received a certificate for five units from appellant without further payment (R. 97, 116). Additional units were sold to other Link-Belt employees (R. 98).

Although Link-Belt Company cancelled appellant's order for the dragline (R. 108), Phillips continued to help appellant raise enough money from the Catholic clergymen in the hope that appellant might buy the machinery. He praised the property, and played up the value of the dredge (R. 112).

Appellant obtained from him a picture of the $250,000 dredge (R. 96), which was then printed on the face of

the unit certificate (R. 97), although it was doubtful, to say the least, whether appellant would ever acquire the dredge.

Appellant falsely represented that the property had been properly tested (R. 165). After a meeting in the Stevens Hotel in Chicago in 1936 attended by Archbishop Beckman, one of the investors, appellant told Phillips that the latter should not have brought up the question of testing the property (R. 117). Appellant said it had been tested. Phillips told appellant the testing was not satisfactory.

In 1938, after a trip to the mining property in Oregon, Phillips demanded and obtained from appellant the return of his note and the money invested by the other Link-Belt employees, because Suetter "hadn't started work up there, no machinery was on the job," and "because the property had not been developed" (R. 116-117). In addition, Phillips testified that no proper testing had been done, no one seemed to be in charge of the property, and that he had never received any accounting (R. 99, 100, 107, 117). However, appellant's explanation to Archbishop Beckman was that he was going to return the money to the Link-Belt group because he was "dissatisfied with the Link-Belt Company" (R. 184).

Archbishop Beckman first met Suetter in 1936 at the

Stevens Hotel meeting. At that meeting Suetter described his mining property in Southern Oregon, and falsely stated that he was the sole owner and had clear title to the property. Archbishop Beckman had already heard about the property from Ed Hogan, Suetter's representative, who had offered to assist the Archbishop in financing the building of a seminary by having him invest in Suetter Placer Mines (R. 165, 166). After talking with Hogan, Archbishop Beckman paid him $2,000 for two units of Suetter Placer Mines. These two units and the trust agreement were later delivered to the Archbishop by Suetter, who denied that Hogan was the owner of the property, but asserted that he, Suetter, was the owner (R. 166). By additional misrepresentations Suetter induced the Archbishop to invest in a considerable number of units paid for by cash and with funds obtained from Suetter's sale of the Archbishop's promissory notes (GX-82; R. 173). Appellant falsely represented that there was nothing in the country like the property (R. 182); that there was enough good ore "to keep us running for 30 years" (R. 27, 178; GX-89); and "you are setting with one hundred million dollars in your lap" (R. 24, 178; GX-88). While representing to Archbishop Beckman that his investment would be used for the purchase of machinery (R. 173) appellant was writing that the money would be used to repay appellant and Montag "for what we have put in it" (R. 212; GX-113).

In an agreement in March, 1938, supplemental to the trust agreement (R. 167-170), appellant falsely represented that he owned "clear title" to the mining properties, that "approximately ninety-five thousand dollars have been invested by Phillip Suetter * * * from his own estate and from his personal sources of income," and that he would furnish Archbishop Beckman itemized statements, inventories and accounts. In disregard of previous trust agreements executed with other purchasers of the units, who had been promised reimbursement of their investments before distribution of income should be made on any of the units, Suetter further agreed and represented that—

> "* * * all net proceeds from the operation of the said Suetter Placer Mines in Josephine County, Oregon, shall be remitted by Phillip Suetter, undersigned herewith, to Archbishop Francis J. L. Beckman at Dubuque, Iowa—after deducting the costs of labor and actual operating expenses in connection therewith—until all outstanding Promissory Notes, issued on this mining project and given to Phillip Suetter by Archbishop Francis J. L. Beckman are fully paid with interest accrued to date of such redemption."

At about this time Archbishop Beckman learned that Montag had an "interest" in the property. He did not know, however, that Montag's interest included one-half of the mines and income therefrom, that Hogan had an interest in the mines, and that appellant had previously

promised Montag that he would repay him for his advances out of moneys received from Archbishop Beckman. He was only told by appellant that Montag's share came out of appellant's interest (R. 187).

By May 14, 1938, Archbishop Beckman had invested $59,000 in cash and had issued to appellant promissory notes in the aggregate amount of $253,750, of which appellant had sold $125,000 (R. 173; GX-82).

Later, Archbishop Beckman borrowed $40,000 from the bank at the insistence of Suetter, who said that this was "all he needed" and that "he would never bother him for another cent, that the $40,000 was needed to put up a mill, and that the mill would certainly produce" (R. 172). In February, 1939, Archbishop Beckman discovered there was no mill, and that the Suetter Placer Mines were "operating but without much result" (R. 172-173).

When Archbishop Beckman learned that Suetter was putting money into other mining ventures (R. 173) he complained and insisted upon Suetter's giving him a 60% interest in all of the various properties (R. 174). Archbishop Beckman testified that when he took Suetter to task for not confining his operations to the Suetter Placer Mines, Suetter made the startling admission—"The Josephine is no good. There are too many boulders. You can't work the Josephine." (R. 174-75).

In March, 1938, without disclosure to any of the investors, Suetter purchased a gold washing plant for over $40,000 to be used on one of his California mining ventures. Most of this amount was paid by checks drawn by Suetter on the Suetter Placer Mines account. About a year later, Suetter sold the plant for $22,500 for which he never accounted (R. 87-91, 202, 224; GX-25). When selling this plant Suetter made an affidavit that he was its sole and exclusive owner (R. 90; GX-23).

With respect to one of these ventures, appellant wrote Archbishop Beckman in May, 1938 (R. 181):

> "I think it would be well for you to give this a good thought and let me come back to Chicago and sell $125,000 worth of these notes in three weeks or less. *You could take this money out of the property within ten months or less* and you would still have five to six years' work on this property with the outfit that is working there now * * * *It will be quick money right now.*" (Emphasis added.)

By March, 1939, the total investment of Archbishop Beckman was over $277,000, exclusive of certain notes which were later cancelled and returned to him (R. 172, 173, 177, 193). After the Archbishop had finally threatened legal action to obtain an accounting, appellant in March, 1939, hired I. R. Perry, an accountant (R. 195). The accounting was never completed. A preliminary trial balance was made as of April 30, 1939. It was submitted

August 1, 1941, and was based on a build-up from checks, bank statements and information from appellant (R. 199). The trial balance disclosed an investment account of over $281,000 and about $20,000 of deposits in two Indiana banks (R. 196-97). These sums did not include the moneys obtained from Montag. The expenditures supported by cancelled checks totaled about $228,000. This included nearly $41,000 in checks written to cash or to appellant, which the accountant described as "personal withdrawals from the Bank" (R. 196, 201) and also included $2,250 in checks to Suetter's wife (R. 201).

In May, 1939, appellant was still seeking additional funds from the Archbishop, appellant was still misrepresenting (R. 19-24, 26-29, 223-24), and the scheme rolled on.

In June, 1939, Archbishop Beckman instituted suit against Suetter for an accounting, and obtained an injunction forbidding Suetter to operate any of the properties. The suit was settled under an agreement whereby the unsold portion of the Archbishop's notes were returned to him, and Suetter deeded to the Archbishop all of Suetter's mining properties in California and Oregon except the claims of Suetter Placer Mines Trust in Josephine County, Oregon. Archbishop Beckman agreed to pay Suetter $20,000 cash and to assume the claims of two other Catholic clergymen, Father Bubacz and Bishop Rhode, on

account of their investments in Suetter Placer Mines (R. 194).

Father Bubacz had invested through Hogan and received his units and trust agreements from appellant (R. 121, 131). This trust agreement contained misrepresentations, as noted above. As late as September 29, 1940, Suetter sought to obtain additional funds from him. Father Bubacz stated that this was in connection with Suetter's settlement with Archbishop Beckman. Appellant's telegram stated (R. 31-32, 122; GX-53):

> "Have Spent Six Thousand to Date Your Sure Not Going to Let These Birds Take Forty Thousand Worth of Machinery for the Amount They Claim Better Fly Out Save it Wire Western Union Satisfied Five or Less Will Do Job—"

Bishop Rhode met appellant in March, 1937, through Father Bubacz (R. 122). Suetter called at Bishop Rhode's residence and told him that he had a specially fine project of placer mining in Josephine County, Oregon; that he had come to interest Bishop Rhode in the matter and to find out whether he would purchase shares or units in the venture, and, as a basis of the investment, he presented an agreement of trust between Suetter, the owner, and the prospective purchasers. Bishop Rhode had already seen a copy of such agreement at the home of Father Bubacz, but he again read the trust agreement "article for article,"

and after consideration, came to the conclusion that it was a "satisfactory document" (R. 127).

Appellant also represented that "with capital and a purchase of machinery and with work at a depth considerable recovery could be had." The amount of the recovery was predicted to be "either twenty or fifty million, something like that" (R. 128).

Although appellant "never did employ engineers to sample and test the property" (R. 120), and the survey and report made by Strong did not purport to be the work of a mining engineer, or to furnish a basis for selling stock to the public (R. 194-95), appellant nevertheless represented to Bishop Rhode that "miners and experts in mining had been consulted" and "they agreed that there were value there that had not as yet been touched" (R. 128).

When Bishop Rhode asked appellant whether he had a "clear and legal title to the property" appellant replied that he did, without disclosing Montag's interest in and mortgage on the claims (R. 129-30). Appellant further represented to Bishop Rhode that "there was gold practically everywhere where you would throw a pickaxe." (R. 137)

Relying upon all of the aforementioned representations as to the ownership and value of the property (R. 127),

and in particular reliance upon the statements made in the trust agreement furnished him, Bishop Rhode, between 1937 and the Fall of 1939 purchased 30 units for which he paid Suetter $30,000 (R. 130, 138) and loaned Archbishop Beckman $10,000 for the latter to invest with Suetter (R. 151).

In his dealings with Bishop Rhode over this period Suetter repeatedly represented that he was almost ready to go into production. Thus, in July, 1937, he wrote, "The drag line is on the grounds, truck and drill will be started this week" (R. 126; GX-67); and six months later wrote, "everything is going fine at the property. Had little delay about getting in fuel oil but that is all overcome now so I expect they will be in operation by the time I get home * * *" At that time he had another excuse: the stock market drop (R. 124; GX-57).

After Archbishop Beckman settled his suit, Bishop Rhode was again asked by appellant to purchase additional units and on July 27, 1939, sent appellant $2,000 "to apply on the Josephine mine." In this letter, which is set forth in Count 6 of the indictment, Bishop Rhode asked appellant to confine his efforts to the Suetter Placer Mines and to "adhere strictly to the terms of our trust agreement" (R. 33-34, 130; GX-68).

As late as August, 1939, after the institution of Arch-

bishop Beckman's suit, appellant continued his attempts to induce Bishop Rhode to invest in his mining project. In a letter which is set forth in Count 7 of the indictment (R. 36-37, 131; GX-69) appellant wrote to Bishop Rhode with respect to the Josephine property:

> "There will be considerable expense connected with getting the property back in operation and in as much as it is up to you and myself to carry the load. I would appreciate another $5,000 to purchase the equipment. I will carry the payroll. *This will result in quick returns.*
>
> "Will appreciate an early and favorable reply as I am very anxious to get the property in operation." (Emphasis added.)

Earlier appellant had been forced to admit to Archbishop Beckman that these mines were unworkable (R. 174-75). This was after Archbishop Beckman had learned that Suetter was putting investors' funds into another property (R. 174).

Appellant's fraudulent purpose also is evinced in one of his letters to Montag where appellant deplored the fact that the equipment was not set up "just to show them in a hurry gold is there" (R. 217).

In February, 1940, having received no return on or accounting for his investment, Bishop Rhode filed suit against appellant to recover the $30,000 he had paid (R.

156-65, 182, 220). In a deposition in that suit appellant admitted that he had used $3,000 of the Bishop's money, without disclosure, to develop one of his California mines (R. 164). He admitted diverting even more than this sum when questioned by one of the jurors during the trial of the present case (R. 227). Ninety thousand dollars in all went into the California properties (R. 163). Appellant sent a telegram to Archbishop Beckman threatening to make the Archbishop a party to the Rhode litigation, with attendant notoriety, unless he immediately caused the suit to be dismissed (R. 182). Shortly thereafter, Bishop Rhode withdrew the suit upon the urging of Archbishop Beckman, who pledged that he would take care of Bishop Rhode's investment (R. 157).

POINTS AND AUTHORITIES

I

The Government Was Not Required To Designate To Which Count or Counts In the Indictment Particular Evidence Was Directed.

Jarvis v. U. S., 90 F. (2d) 243, 244-45 (C.C.A. 1, 1937)

Coplin v. U. S., 88 F. (2d) 652, 668 (C.C.A. 9, 1937)

Schonfeld v. U. S., 277 Fed. 934, 937 (C.C.A. 2, 1921)

Moffatt v. U. S., 232 Fed. 522, 534 (C.C.A. 8, 1916)

Southern Pacific Co. v. Schoer, 114 Fed. 466, 472 (C.C.A. 8, 1902)

1 Wigmore, Evidence (3rd Ed., 1940) §13

Tenenbaum v. U. S., 11 F. (2d) 927, 929 (C.C.A. 5, 1926)

Hartzell v. U. S., 72 F. (2d) 569, 584 (C.C.A. 8, 1934)

Hendrey v. U. S., 233 Fed. 5, 13 (C.C.A. 6, 1916)

II

There Is No Inconsistency In the Verdict; Even If There Were, It Would Not Be Reversible Error.

Dunn v. U. S., 284 U. S. 390, 393

Macklin v. U. S., 79 F. (2d) 756, 758 (C.C.A. 9, 1935)

Coplin v. U. S., 88 F. (2d) 652, 661 (C.C.A. 9, 1937)

Muench v. U. S., 96 F. (2d) 332, 336 (C.C.A. 8, 1938)

Sieden v. U. S., 16 F. (2d) 197, 198 (C.C.A. 2, 1926)

III

The Jury's Verdict of Guilty On Counts 6 and 7 of the Indictment Was Fully Supported By the Evidence.

Hemphill v. U. S., 120 F. (2d) 115, 117 (C.C.A. 9, 1941)

Holmes v. U. S., 134 F. (2d) 125, 130, 133 (C.C.A. 8, 1943)

Simons v. U. S., 119 F. (2d) 539, 549 (C.C.A. 9, 1941)

ARGUMENT

I

The Government Was Not Required To Designate To Which Count or Counts In the Indictment Particular Evidence Was Directed.

Appellant objected to the introduction in evidence of twenty-two of the Government's exhibits on the ground that "the Government should be compelled to elect as to which count or counts in the indictment said evidence was directed."[6] The cases of *Jarvis v. U. S.,* 90 F. (2d) 243, 244-45 (C.C.A. 1, 1937) and *Coplin v. U. S.,* 88 F. (2d) 652, 668 (C.C.A. 9, 1937) do not support the proposition thus urged by appellant (App. Br. 25) but hold, in accordance with the general rule, that where the defendant

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(6) The printed record discloses that this objection was raised only against the introduction of Government's Exhibits 1-3, 7-17, 36-38, 40, 42, 57, 67 and 79. Contrary to defendant's statement (App. Br. 30-31, 38; 18), this objection was not directed against the Government's evidence generally nor even against Government's Exhibits 4, 5, 6 and 19.

Defendant's assignment of error relating to the admission of these exhibits does not comply with Rule 2(b) of the Rules of this Court governing criminal appeals since defendant does not quote the grounds urged at the trial for the objection and exception taken nor does he quote the full substance of the evidence admitted. See *Waggoner v. U. S.,* 113 F. (2d) 867, 868 (C.C.A. 9, 1940).

deems certain evidence, which has been offered generally, incompetent to establish a particular count of an indictment his remedy is to ask the court to instruct the jury to disregard such evidence in their consideration of that count. *Schonfeld v. U. S.*, 277 Fed. 934, 937 (C.C.A. 2, 1921); *Moffatt v. U. S.*, 232 Fed. 522, 534 (C.C.A. 8, 1916); *Southern Pacific Co. v. Schoer*, 114 Fed. 466, 472 (C.C.A. 8, 1902). 1 Wigmore, Evidence (3d ed., 1940) §13. Appellant made no such request either at the time the exhibits in question were offered or at the time instructions were given to the jury; and no exception was taken to the instruction given by the trial court (R. 257).

In this case the trial judge properly permitted the government to introduce the exhibits in question without limitation. These exhibits comprised letters, checks and other documents bearing on the scheme to defraud which was incorporated in all of the counts. Certain of the exhibits showed, among other things, the nature and extent of Montag's interest in the mining claims. This proved the falsity of appellant's representations of sole and unencumbered ownership in appellant, which was part of the scheme to defraud. These misrepresentations were made to a number of the persons to be defrauded (including Bishop Rhode).

Other of the exhibits showed appellant's promises and representations to Montag, Phillips, Archbishop Beckman,

Father Bubacz and Bishop Rhode all of which were proven to have been made by appellant as part of his scheme to defraud. It is well established that in proving a fraudulent scheme great latitude is to be allowed in the proof of attendant circumstances; and that evidence tending to establish its existence may be extensive in scope. *Tenenbaum v. U. S.,* 11 F. (2d) 927, 929 (C.C.A. 5, 1926); *Hartzell v. U. S.,* 72 F. (2d) 569, 584 (C.C.A. 8, 1934); *Hendrey v. U. S.,* 233 Fed. 5, 13 (C.C.A. 6, 1916).

II

There Is No Inconsistency In the Verdict; Even If There Were, It Would Not Be Reversible Error[7]

Appellant admits that inconsistency in a verdict furnishes no ground for reversal. *Dunn v. U. S.,* 284 U. S. 390, 393; *Macklin v. U. S.,* 79 F. (2d) 756, 758 (C.C.A. 9, 1935); *Coplin v. U. S.,* 88 F. (2d) 652, 661 (C.C.A. 9, 1937). He contends, however, that the facts in this case come within a purported exception to the rule, in that all of the counts in the indictment were based upon the same

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(7) Since this point was raised for the first time on motion for a new trial which was denied, there is considerable doubt whether the question is preserved on appeal. *Roubay v. United States,* 115 F. (2d) 49, 50 (C.C.A. 9, 1940).

scheme to defraud and, as appellant erroneously asserts, the government introduced precisely the same evidence to prove all of the charges.

Appellant was acquitted on Counts 1, 2 and 5, and the verdict of guilty on Counts 3 and 4 was set aside by the trial court. Appellant's contention rests on the purported inconsistency between the verdict of not guilty on Counts 1 and 2 and the guilty verdict on Counts 6 and 7. Counts 1 and 2 allege two distinct mailings to Bishop Rhode for the purpose of executing the scheme to defraud in contravention of the mail fraud statute. Counts 6 and 7 set forth different mailings in the sale of units of Suetter Placer Mines to Bishop Rhode in violation of Section 17(a)(1) of the Securities Act. Although each count involved the same scheme to defraud, the counts in question did have other elements which were different, and the evidence, properly offered without limitation to establish the existence of the scheme to defraud, may well have had greater or less probative value to establish other components of the two offenses. Thus, although appellant admitted that he had sent the letters and used the other means of interstate commerce charged in the indictment (R. 203; App. Br. 29), the jury could have concluded that the particular letters in Counts 1 and 2 were not "for the purposeof executing" the scheme to defraud (see *Muench v. U. S.*, 96 F. (2d) 332, 336 (C.C.A. 8, 1938)), at the

same time deciding that the mailings involved in Counts 6 and 7 were "in the sale of a security." As the District Court pointed out in denying the motion for a new trial (R. 251-52):

> "* * * there is absolutely no inconsistency between the finding as to the Rhode letters in Counts One and Two and as to these (Counts Six and Seven) letters."

However, even if the evidence was exactly the same on all of the counts, the verdict of guilty on Counts 6 and 7 may not be set aside for inconsistency. In the *Dunn* case, *supra,* which establishes the rule conceded by defendant, Mr. Justice Holmes observed that "the evidence was the same for all the counts." And see *Sieden v. U. S.,* 16 F. (2d) 197, 198 (C.C.A. 2, 1926) where Circuit Judge Learned Hand declared:

> "We have held that, when the jury convicts upon one count and acquits upon another, the conviction will stand, though there is no rational way to reconcile the two conflicting conclusions." (Quoted with approval in *Macklin v. U. S.,* 79 F. (2d) 756, 758 (C.C.A. 9, 1935).

III

The Jury's Verdict of Guilty On Counts 6 and 7 of the Indictment Was Fully Supported By the Evidence.

Appellant contends that there was insufficient evidence to sustain the verdict of guilty on Counts 6 and 7 (App. Br. 19-23, 31-38).[8] Review on such an issue is confined to determining "whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict." *Hemphill v. U. S.*, 120 F. (2d) 115, 117 (C.C.A. 9, 1941). As the Court declared in *Holmes v. U. S.*, 134 F. (2d) 125, 130 (C.C.A. 8, 1943):

> "The jury having found defendant guilty we must assume that all conflicts in the evidence have been resolved in favor of the Government. It is not our province to pass on conflicts in evidence, credibility of witnesses, plausibility of explanations by defendant, nor the weight of the evidence. If there is substantial evidence viewed in a light most favorable to the Government to sustain the verdict, then it ought not to be set aside."

As the evidence heretofore set forth clearly shows, appellant's scheme was created for the purpose of de-

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(8) Appellant did not renew his motion for a directed verdict at the end of the case.

frauding various persons who could be persuaded to invest in units of, or interests in, the Suetter Placer Mines. To induce investors to turn over money and property to him in reliance upon his promises, appellant falsely represented to them that he had sole and unencumbered ownership of a "specially fine" mine on which "there was gold practically everywhere where you would throw a pick-axe"; that "miners and experts in mining had been consulted and * * * agreed that there were values there that had not as yet been touched"; that the property had been properly tested; and that "from twenty to fifty million could be recovered" from the mines.

To lull investors into a false sense of security, appellant repeatedly tendered specious excuses for the failure to produce, and continually promised tremendous returns with no justification or basis therefor. To the contrary, the meagre results, if any, that were achieved over so many years, show quite clearly that appellant fully realized the fraudulent character of his statements.

Upon the basis of these fraudulent representations, investors were duped into investing hundreds of thousands of dollars in the units and interests in the mining claims. Moreover, appellant played fast and loose even with the small prospects, if any, that the investors had. When compelled to, he made commitments with respect to the income of the trust to Montag, Hogan and later Archbishop

Beckman which were wholly inconsistent with the interests of the other investors. Machinery or no machinery, as he much later confessed to the Archbishop, the claims could not be worked. Appellant did not even have the sole and unencumbered ownership of the mines, as he consistently represented.

First Montag was tapped for all he could yield by means of constantly reiterated statements that great production was just around the corner. When Montag would not give any more money on such representations, appellant induced him to continue his advances, for the "new" purpose of financing appellant in putting over the "deal" with the "fathers." This was to be no "penny anti game," but one for big money, from which, on the one hand, Montag was led to believe he would be able to recoup his advances, and on the other hand, the investors were promised the entire returns. To still Montag's wholly justified fear about the nature of the "deal," appellant assured him that "your name doesn't appear nowhere, only between ourselves."

The investors were presented with the rosy prospect of quick and easy returns based on great value—predictions and representations which appellant knew to be false and impossible of attainment.

To inspire their confidence, appellant represented that

he had many years of experience in successful mining ventures, and that he had a large personal financial investment in the Suetter Placer Mines. In fact, he had acquired the mines with money advanced by others shortly after going through bankruptcy, and had previously been a horse trader with but slight and desultory experience in gold mining.

Contrary to appellant's representations, and despite the investors' frequent requests, the money thus obtained by appellant was never accounted for, and was misapplied by appellant to finance his other ventures. Machinery purchased with investors' funds was secretly used in these other mines, and later sold for appellant's gain. In disregard of appellant's trust obligations, money advanced by one group of investors (the employees of Link-Belt Company) was repaid when they discovered his misrepresentations as to the condition of the mines. Other funds he withdrew for the use of himself and his wife.

The scheme to defraud thus perpetrated upon investors which began in 1934, when the claims were acquired, continued at least through all of 1939. In July, 1939, Bishop Rhode was induced to mail appellant $2,000 to apply on the mine (the letter recited in Count 6 of the indictment). In August, 1939, despite his prior admission to Archbishop Beckman that the mine was "no good" and could not be worked, appellant used the mails (the letter

set forth in Count 7 of the indictment) in an endeavor to induce[9] Bishop Rhode to purchase still more units to pay for equipment which, appellant represented, would "get the property back in production" and "will result in quick returns."

Contrary to assertions in appellant's brief, Bishop Rhode and the other investors did rely on appellant's representations in buying the securities issued by appellant; and it was not necessary to establish that every fraudulent misrepresentation alleged in the indictment was made to every investor, since the use of the mails was admitted and the scheme to defraud was established substantially as alleged. *Simons v. U. S.,* 119 F. (2d) 539, 549 (C.C.A. 9, 1941); *Holmes v. U. S.,* 134 F. (2d) 125, 133 (C.C.A. 8, 1943).

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(9) An attempt to sell is expressly defined as a sale in Section 2(3) of the Securities Act of 1933.

CONCLUSION

The overwhelming weight of the evidence, substantially undisputed at the trial, showed a scheme to defraud carried on over a period of years in the sale of securities by use of the mails and interstate commerce in clear violation of Section 17(a)(1) of the Securities Act.

Appellant had a fair trial. His contentions with respect to the "inconsistency" of the verdict and to the Government's introduction in evidence of certain exhibits are without merit.

The conviction should be affirmed.

Respectfully submitted,

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